

UNPUBLISHED
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

EINAR RAVEN,

Plaintiff,

vs.

JOANNE B. BARNHART,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. C03-3077-MWB

REPORT AND RECOMMENDATION

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I. INTRODUCTION

The plaintiff Brian D. Raven (“Raven”) appeals a decision by an administrative law judge (“ALJ”) denying his application for Title XVI supplemental security income (“SSI”) and Title II disability insurance (“DI”) benefits. Raven claims the ALJ erred in finding alcohol abuse was a material factor contributing to his disability. (*See* Doc. No. 8)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On May 22, 1995, Raven protectively filed applications for DI and SSI benefits, alleging a disability onset date of January 1, 1990. (R. 37, 38-52, 53-44, respectively) Raven alleged he was disabled due to depression and a past history of alcohol abuse. (*See* R. 46) His applications were denied initially on July 11, 1995 (R. 45-60, 61-63, 64-68), and on reconsideration on September 22, 1996. (R. 70-85, 86-90, 91-92) On October 20, 1995, Raven requested a hearing. (R. 93) On July 16, 1996, Raven voluntarily withdrew his request for hearing (R. 176), and on July 26, 1996, the request for hearing was dismissed, with the result that the reconsideration determinations denying Raven’s applications remained in effect. (R. 177-82)

Raven protectively filed new applications for DI and SSI benefits on October 10, 1996 (R. 261-64, 466-67, respectively), alleging a disability onset date of January 1, 1990. He subsequently amended his alleged disability onset date to October 1, 1996. (R. 260, dated Jan. 26, 2001) The applications were denied initially on December 23, 1996 (R. 183, 468-73), and on reconsideration on January 18, 1997 (R. 184-87, 474-79). On January 27, 1997, Raven requested a hearing (R. 227), and a hearing was held before ALJ

John P. Johnson on September 25, 1997, in Mason City, Iowa. (R. 480-521) Raven was represented at the hearing by attorney Thomas A. Krause. Raven testified at the hearing, and Vocational Expert (“VE”) Jeff L. Johnson also testified. On June 1, 1998, the ALJ ruled Raven was not entitled to benefits. (R. 188-200; *see* R. 201--15)

Raven appealed the ALJ’s ruling. (R. 230-33) On July 13, 1999, Raven advised the Appeals Council that he had filed a subsequent application for benefits (*see* R. 278-80) and had been awarded benefits. (*See* R. 242-53) Raven requested the new claims file be made part of the record. (R. 235) On September 7, 2000, the Appeals Council of the Social Security Administration reversed and remanded the case to the ALJ for further proceedings. (R. 236-39) A supplemental hearing was held on January 26, 2001, in West Des Moines, Iowa, again before ALJ Johnson. (R. 522-74) Raven again was represented by Thomas Krause, and Raven again testified. Also testifying at the hearing were VE Brian Paprocki, and Donald Feinsilver, M.D., a medical expert.

On March 31, 2003, the ALJ ruled Raven was not entitled to benefits. (R. 12-27) On August 4, 2003, the Appeals Council of the Social Security Administration denied Raven’s request for review (R. 8-10), making the ALJ’s decision the final decision of the Commissioner.

Raven filed a timely Complaint in this court on September 5, 2003, seeking judicial review of the ALJ’s ruling. (Doc. No. 1) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Raven’s claim. Raven filed a brief supporting his claim on January 2, 2004. (Doc. No. 8) The Commissioner filed a responsive brief on March 15, 2004. (Doc. No. 11). The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Raven’s claim for benefits.

Notably, based on the above procedural history, and as noted by the ALJ in his opinion (*see* R. 15), the only period at issue in this case is the period from Raven's amended alleged disability onset date of October 1, 1996, through June 1, 1998 (the day prior to the date from which Raven has been found to be disabled and eligible for benefits pursuant to his subsequent applications).

B. Factual Background

1. Introductory facts and Raven's testimony

Raven was born in 1948. The record indicates he began suffering from depression or other mental problems at age 16, when he was hospitalized at Iowa City for more than two months and placed on medication. He also had a subsequent hospitalization as a teenager, at Cherokee Mental Health. Raven started drinking heavily at age 17, which he stated was for the purpose of "medicating" himself to deal with his depression. He underwent treatment for substance abuse on several occasions.¹

From 1980-81, Raven worked at E.F. Johnson as an office machinery technician, requiring him to lift or move machinery weighing anywhere from ten to 400 pounds. (R. 294, 532) From 1981-82, he was self-employed doing office machinery repair. (*Id.*) In the summer of 1982, he worked for Crabtree Construction, as a laborer. (R. 532-33) He stated he "did some welding and then stacking steel and unloading steel off of semi's . . . to be made into the equipment they need or putting it back on the semi to be delivered on the site." (R. 533) He estimated the job required him to lift 100 to 150 pounds regularly. (*Id.*) In 1983, Raven worked for Mason City Tractor as a stock boy. He

¹*See generally* Appendix A, summary of Raven's medical records, filed under seal.

stocked bags of grass and garden supplies, weighing anywhere from twenty-five to 100 pounds. (R. 532)²

In 1992, Raven worked for a plumbing company, digging ditches six to ten feet deep for water, gas, and sewer lines. In 1993, Raven worked for Mason City Artificial Ice, bagging ice out of a machine, putting 75-pound bags of ice onto a pallet, and stacking them for refrigeration. He worked for the company for a couple of summers. (R. 531)

Raven's last job was with Kraft Foods³, where he worked from mid-1994 to August 1996. He loaded cups into a machine, and also did some janitorial and clean-up work. The job was part of a vocational program through North Iowa Vocational Rehabilitation. He stated the job required him to lift anywhere from fifteen to fifty pounds at a time, and most of his duties required him to stand. He stated he missed a lot of work due to his depression and personal problems. According to Raven, he lost the job in about August of 1996, because of his poor attendance record. (R. 294, 529-31, 535) He stated the "straw that broke the camel's back"⁴ was when he vomited on the "hamburger room floor," which he attributed to "hydrogen peroxide that was floating around in the air that day," although he also noted he "could have been coming down with a touch of the flu or a bad cold." (R. 536) That was the last day he worked. (*Id.*)

Raven stated that while he was working at Kraft Foods, he sometimes had difficulty remembering what he was supposed to do and keeping his mind on task. These problems interfered with his ability to do his work. (R. 537-38) He also had trouble getting along

²There is a gap in Raven's employment history from 1983 to 1992. From the record, it appears Raven was either hospitalized or incarcerated during a portion of that time, but the chronology is not clear. However, his job history during that period is not relevant to the present case.

³Kraft Foods is also referred to as General Foods in the record.

⁴This was the ALJ's characterization, with which Raven agreed.

with his coworkers, and he left work a couple of times because he became upset over personality conflicts and conflicts involving other employees' authority to tell him what to do. (R. 538) He noted he did not have problems getting along with people outside of work because he avoided associating with them. (R. 539) He also described difficulties dealing with stress, and noted that when he felt stressed, he would "usually end up leaving the job." (*Id.*)

A psychological consultant reviewed Raven's history and determined, in July 1995, that Raven was moderately limited in several work-related areas of functioning, but he nevertheless was "capable of simple routine 1-3 step task[s] at appropriate pace under normal supervision," in a "simple routine work setting." (R. 57-60) The consultant found Raven frequently had deficiencies of concentration, persistence or pace, resulting in a failure to complete tasks in a timely manner, and he had experienced one or two episodes of deterioration or decompensation in work or work-like settings. (R. 48-56)

Two months later, in September 1995, a second psychological consultant found Raven could understand and carry out a variety of tasks and instructions, stay on task, conform to a schedule, not be distracted excessively in a work setting, exercise judgment about ordinary hazards, and manage changes or stress in work settings. The consultant opined Raven had never had an episode of deterioration or decompensation in work or work-like settings. (R. 73-85)

A vocational status report, in May 1996, indicated Raven was able to remember and follow directions from supervisors and observe safety rules, and his concentration was acceptable. The case worker noted Raven had poor attendance, missing work for physical and personal problems and to make repairs to his trailer. She noted Raven needed to show measurable improvement to remain on the job at Kraft Foods. (R. 362) At that time,

Raven was maintaining abstinence from alcohol on Antabuse, and Zoloft was helping his depression and irritability. (R. 424)

In mid-August 1996, Raven was working at Kraft Foods, where he had been placed by the North Iowa Vocational Center. He claimed hydrogen peroxide made him sick, and he told coworkers he had vomited on the floor in the “Hamba Room.” This was a violation of Kraft’s Good Manufacturing Procedures, and due to the violation, Raven was not allowed to return to the job. He was dropped from the vocational program altogether because he did not meet the attendance criteria for other jobs. The case worker noted Raven could be allowed to return to the program (although not to the Kraft Foods jobsite) if he showed proof he was getting help for his drinking problem and a willingness to change. (R. 361) The case worker noted that when Raven was present on the job, he “performed all of the tasks expected of him.” (*Id.*) The case worker listed Raven’s strengths as “[c]o-worker relationships, cooperation, quality of work, speed of work, and his appearance,” and his needs as “extremely poor attendance and following procedures.” (*Id.*)

After Raven lost his job at General Foods, he lived at Liberty Square Residential Care Facility from October 7 to December 2, 1996. He stated he moved into the facility because he was experiencing emotional problems and depression, he was unable to maintain a job due to depression, and he was isolating himself from society. He quit drinking when he moved into Liberty Square in 1996, at age 48. He stated he had “slipped” only twice since then, but his relapses only lasted two days each time because it made him sick to drink again. (R. 528, 539) While he was at Liberty Square, doctors tried him on several medications for depression. He stated he had some memory problems and problems understanding instructions while he was trying the different medications. (R. 539) He did not have problems getting along with the staff, but he did have problems

with other residents. He stated his life was threatened twice while he was at Liberty Square, but the staff “didn’t seem to want to do anything about it.” (R. 540) He left the facility because he “wasn’t going to live in that type of environment.” (*Id.*)

After he left Liberty Square, Raven continued to see a doctor and be treated for his depression. He lived with his sister for a short while, and then moved into Willow Annex in Mason City, which he described as “a unit that was just providing sleeping quarters.” (R. 529, 540) He paid for his room by doing community service for the county; specifically, he did a few hours of dishwashing each month. (R. 529, 541) He stated his depression continued to worsen during the six to eight months he lived at Willow Annex. (*Id.*) He had some problems during that time remembering things, understanding things, and keeping his mind on things. He opined his problems were due to adjustment to the medications he was being given. (R. 541-42) He did not have problems relating to other residence because he avoided associating with them. (R. 542)

When he left Willow Annex, Raven moved in with a friend for a couple of months. The friend was a substance abuser. Raven was living with the friend when he was hospitalized in January 1998. (R. 542, 528; *see* R. 444-49) The hospitalization occurred because Raven had stopped taking his medication when he ran out of samples, and he became suicidal. (R. 444-49, 454, 545) He stated that while he was hospitalized, doctors finally got him on a medication that worked, and he no longer had difficulties understanding things or keeping his mind on things. When he left the hospital, he went back to his sister’s home for a short time. He re-filed for disability benefits, and when he was awarded benefits, he got his own apartment. (R. 542-53) Raven testified he had been approved for benefits about a year prior to the second hearing, and he continued to receive benefits. (R. 527)

According to Raven, due to his depression there was no time period between October 1996 and June 1998, when he would have been able to work on a sustained basis. He was isolating himself from society at that time. He stated further that he had not noticed any significant difference in his condition since June 1998. (*Id.*)

At the time of the hearing, Raven did not have a valid driver's license. He stated the last time he had a valid license was in 1986 or 1989. (R. 533-34) His lost his license for driving while impaired. (R. 435)

Raven described his typical daily activities at the time of the hearing as follows:

Nowadays I have a one-bedroom apartment. I typically wake up. It depends on what time of the day that I go to bed, but I usually end up sleeping 12 to 14 hours a day. Fix food, check the mail, and go outside if the weather is nice and walk around. And that's about it.

(R. 546-47)

2. *Raven's medical history*

The record contains entries regarding Raven's medical history as far back as 1990. Because the period at issue here is only from October 1, 1996, through June 1, 1998, the court will focus on that time period, but will summarize his earlier history as necessary to provide an overall picture of his condition during the relevant period. All of the medical records are summarized in some detail in Appendix A to this report and recommendation, filed separately under seal.

The record indicates Raven has a long history of treatment for depression and alcohol abuse. He has been through several treatment programs for alcoholism, and has had legal problems brought on by his behavior while drinking. He eventually was able to stop drinking with the help of Antabuse and antidepressant medications. From the record,

it appears numerous antidepressant medications were prescribed for Raven before he finally began receiving much benefit from any of them.

Raven was treated for his depression by M.E. Lassise, M.D., of the Mental Health Center of North Iowa. He began seeing Dr. Lassise at least as early as April 2, 1992. (*See* R. 142) On October 11, 1996, Raven saw Dr. Lassise complaining of “some difficulties with accommodation while reading and tremulousness” due to the Doxepin he was taking. (R. 424) Dr. Lassise switched him to Nortriptyline. The doctor noted Raven’s GAF at the time was 52, indicating “moderate symptoms (*e.g.*, flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational, or school functioning (*e.g.*, few friends, conflicts with peers or co-workers).” American Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) (“DSM-IV”), at 32.

At his next appointment, on November 8, 1996, Dr. Lassise noted Raven had been managed on Remeron, but he was noting some irritability. His Remeron dosage was increased. He had a current GAF of 54, indicating little change in his symptoms. (R. 424; *see* DSM-IV at 32)

Dee E. Wright, Ph.D. performed a psychiatric review technique and a mental residual function capacity assessment of Raven on December 23, 1996. (R. 301-15) Dr. Wright found Raven was moderately limited in his ability to perform several work-related activities, and often would have deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner. Dr. Wright found no evidence that Raven had experienced episodes of deterioration or decompensation in work or work-like settings. *Id.* He opined Raven

would appear able to sustain a range of simple, repetitive, and routine cognitive activity when he is motivated to do so. [He]

would probably have some difficulties consistently performing complex cognitive activity that would require prolonged attention to minute details. [He] does not appear to manifest significant restrictions of function with social interaction [and] appears able to sustain at least short lived, superficial interaction with others when he is motivated to do so. [He] appears able to sustain adequate self care . . . [and] independent, goal oriented activity when he is motivated to do so.

(R. 304) John C. Garfield, Ph.D. reviewed the file on January 16, 1997, and affirmed Dr. Wright's findings regarding Raven's mental RFC. (R. 322-33)

Raven next saw Dr. Lassise on February 17, 1997, after cancelling his appointment that had been scheduled for January 31, 1997. The doctor noted Raven had been taking Prozac with variable results. He reported mood swings during the day with some irritability, and poor sleep. Dr. Lassise prescribed Wellbutrin. He assessed Raven's GAF at 49, indicating serious symptoms such as suicidal ideation or obsessive rituals, or "any serious impairment in social, occupational, or school functioning (*e.g.*, no friends, unable to keep a job)." DSM-IV at 32. (R. 427) A month later, on March 17, 1997, Raven's symptoms had improved significantly on Wellbutrin with no side effects. He had a current GAF of 55. (*Id.*)

At his next follow-up appointment, on April 28, 1997, doctor's notes indicate Raven was being managed on both Paxil and Wellbutrin. Raven felt Remeron had worked better than Paxil, and the doctor switched him back to Remeron. Raven's current GAF was 58, indicating slight improvement in his symptoms. (*Id.*; *see* DSM-IV at 32) When Raven next saw Dr. Lassise, on August 18, 1997, he reported no benefits from the Remeron. The doctor gave him another trial of Paxil. Raven's current GAF was 49, indicating his symptoms had worsened significantly. (R. 426; *see* DSM-IV at 32)

On October 30, 1997, Raven underwent a psychiatric evaluation by R.M. Larsen, M.D., on referral from Disability Determination Services (“DDS”). Dr. Larsen found Raven to be oriented to time, place, and person. He had good concentration and immediate recall, and his remote memory was within normal limits. He answered all of the doctor’s questions clearly. Dr. Larsen observed that Raven had poor insight, and impaired judgment due to his impulsivity. Raven reported that he can cook, clean, do his own laundry, take care of his home, and attend to his personal needs (wash hair, brush teeth, dress himself). He described trouble remembering things, and stated he gets confused easily and has difficulty paying attention to projects. He reported getting bored easily and feeling distracted. (R. 434-35)

Dr. Larsen indicated Raven’s prognosis was “[g]uarded.” (R. 436) The doctor reached the following conclusions regarding Raven’s work-related abilities, from a psychiatric standpoint:

The patient is able to understand, carry out, and remember instructions, locations, and work-like procedures. He is unable to maintain adequate attention and concentration, as he is impulsive and doesn’t like people telling him what to do. Likewise, he is unable to maintain adequate persistence and pace, as he is easily distracted and is not used to working in a structured environment. He would respond poorly to work pressures and changes in the work environment, and would tend to blame others. He would not respond appropriately to supervisors and has a history of not getting along well with coworkers. He would be able to interact appropriately with the general public, but would be unable to manage cash benefits at this time due to his impulsivity.

(*Id.*)

On November 3, 1997, Raven underwent a psychological examination for DDS by Steven Gordon, Psy.D. Dr. Gordon indicated the scope of his examination was “an

intellectual assessment, personality assessment, and organic screening evaluation.” (R. 428) Dr. Gordon administered several tests to Raven, including the Rey’s Fifteen Item Memorization Test, the Bender-Gestalt Test, the Hooper Visual Organizational Test, Trail Making A and B, Wechsler Adult Intelligence Scale - Revised (WAIS-R), and the Minnesota Multiphasic Personality Inventory - 2 (MMPI-2). Dr. Gordon observed that Raven was task oriented, “serious and somber throughout the testing,” and “appeared to do his best on the various tasks.” (R. 430) He further noted, Raven’s “responses on the Rey’s Test do not suggest malingering.” (*Id.*)

Dr. Gordon assessed Raven’s verbal IQ at 79, performance IQ at 82, and full scale IQ at 80. (*Id.*) He noted Raven was functioning at the low end of the Low Average range of intelligence, performing adequately in the area of visual organization, and poorly in the areas of fund of acquired knowledge, attention, concentration, flexibility, expressive language development, arithmetic reasoning, understanding appropriate social behavior (judgment), abstract reasoning and concept formation, alertness to environmental details, understanding social situations, visual-spatial perception, and psychomotor speed. (R. 431) The doctor indicated the MMPI-2 results likely were not accurate, which he opined was due to Raven’s responding randomly, attempting to “fake bad,” or perhaps trying to exhibit a “cry for help.” (*Id.*)

Dr. Gordon concluded the testing suggested “some mild organic impairment which may also be related to the continued alcohol abuse over the years.” (R. 432) Regarding Raven’s work-related capabilities, Dr. Gordon found as follows:

Mr. Raven has the ability to remember simple locations and work-like procedures. He may have problems carrying out more detailed instructions. He may have problems maintaining attention and concentration for extended periods. He has the ability to sustain an ordinary routine without special

supervision and make simple work-related decisions. He has had some conflicts with coworkers in the past. He presents as being somewhat moody and may have a low frustration tolerance. As a result he may have problems interacting appropriately with the general public and getting along with coworkers and supervisors. He may have problems responding appropriately to changes in the work setting. Pace will be slow. Judgment appears poor. He should not handle cash benefits at this time due to poor judgment, impulsivity, and poor math skills.

(R. 431)

Dr. Lassise and social worker Ken Zimmerman conducted a clinical assessment of Raven for purposes of updating their findings and recommendations regarding Raven's psychiatric condition. Their conclusions were set forth as follows in an opinion letter dated November 21, 1997:

[Raven] has continuously held out the hope that he would be able to stabilize in his thinking, emotions, and daily behaviors in such a way as to resume some degree of normalcy in his daily life and with that, be able to resume meaningful experiences that would include work. However, in spite of his hope to do so he has clearly not been able to maintain regular attendance, have sustained attention, carry out a normal work day schedule, pace himself, or remain concentrated on a topic. He would show difficulty in rendering opinions and judgment, and would feel overwhelmed easily by the interactions of the general public or in collegial work relationships that required a sustained investment for tolerance of frustration and a degree of resiliency.

[Raven] continues to feel overwhelmed by even the minor daily events in his schedule. . . . He continues to be followed closely for psychiatric medication management at the Mental Health Center.

Mood disturbance of a marked nature continues to manifest itself in his thinking, his affect, and his behavior. There are days when he will only be able to sleep three to four hours a day, and on other days he may feel like staying in bed all day.

In today's session [Raven] feels easily overwhelmed, is unable to chain together tasks that are given to him or information provided him without asking or seeking assistance. His ability to count on himself is limited and his ability to handle frustration has continued to remain markedly impaired.

. . .

[Raven's] concentration is limited to less than ten minutes and would be unable to be relied upon to maintain consistency in thinking or in pacing himself behaviorally in a work setting without being off task for a preponderance of time. This would clearly affect his ability to work with others and the general public. He demonstrates an inability to coordinate his work, his behaviors, or to adjust those in light of rapidly changing environmental conditions or in human relationships.

[Raven's] judgment shows impairment and would be expected to reflect difficulties in making accurate reasonable judgments on the use of his time, in relationships with others, and in a work environment even of a simple work-related nature.

It is our opinion that [Raven] would be unable to carry out the functions of any employment over the next 12 to 24 months. It remains hopeful that stabilization can occur in mood, thinking, and behavior at some time in the future. Our records and our clinical experience indicate that that has not happened to date and [we] would not see this as a situation that would rapidly reverse itself in the near future.

(R. 442-43)

Raven saw Dr. Lassise again on January 19, 1998, for follow-up regarding his depression. He reported that he had quit taking Paxil when he ran out of samples, and he

was experiencing mood fluctuations and social difficulties surrounding his living environment. Raven stated he was staying sober but his roommate was a substance abuser. The doctor scheduled Raven to see a therapist, and gave him a trial of Wellbutrin. He assessed Raven's current GAF at 46, indicating serious symptoms. R. 454; *see* DSM-IV, at 32)

Raven went to the North Iowa Mercy Health Center on January 22, 1998, and reported he was having fantasies of killing himself in several different ways. He was admitted into the hospital and placed on suicide precautions. He appeared isolated and withdrawn. The admitting doctor noted one of Raven's chief concerns was his appeal from the denial of Social Security benefits, which the doctor noted "created the specter of secondary gain from being in the hospital." (R. 444) In addition, Raven reported that his alcoholic roommate had kicked him of his place of residence. Living arrangements were discussed for the period following his discharge, including placement in a transition center. At the time of his discharge on January 25, 1998, Raven denied suicidal ideation or intent, and said he was feeling better. He "remained focused on getting disability," which the doctor noted was "a complicating factor." (*Id.*) However, the doctor noted that due to his personal and family history, and Raven's social isolation, he remained at risk for suicide in the future. Thus, his prognosis remained guarded. He was discharged on Wellbutrin, augmented with Zyprexa for "what appeared to be some auditory hallucinations." (*Id.*)

3. *Medical expert's testimony*

Donald Feinsilver, M.D. testified as a medical expert at the hearing. He stated he is a Board-certified physician who practices medicine in Wisconsin, with an emphasis in psychiatry. (R. 546) The ALJ asked Dr. Feinsilver if he had "an opinion based upon a

reasonable degree of medical certainty as to the appropriate diagnosis in this case for the period of time from 1990 to June 1998.”⁵ (R. 547) The doctor replied as follows:

Yes, I do have such an opinion. And I think during that period of time, clearly one of the applicable diagnosis [sic] was that of alcohol addiction. That’s 12.09, substance addi[c]tion disorders. Also seemingly present during that time, but it would be very difficult to tease it out, there apparently was an affective disorder, 12.04. More specifically some type of depression, variously described in medical records. I would also wonder, although this I really don’t find in the medical records, but looking at the totality of his life history, whether there may be some underlying personality disorder. That refers to a long-standing maladaptive manner relating to the environment. I notice a certain sense of detachment in terms of his overall quality and quantity of relationship with people, and his environments. And wonder if that may be basically signs of an underlying personality disorder. But be that as it may, in terms of my level of certainty, I’m certain that alcohol addiction is a problem during that time period. And I believe that some aspect of depression is also, at least, episodically problematic during that time period. And I would add that it’s going to be difficult to sort that out since alcohol in itself is depressive. And I would also consider, so those are my three levels of confidence, I would consider the possibility of there being an underlying personality disorder as well during that time period.

(R. 547-48)

The ALJ then asked the doctor to rate Raven’s level of limitation in the area of restrictions in activities of daily living. Dr. Feinsilver noted Raven’s overall level of

⁵Raven did not amend his alleged disability onset date to October 1, 1996, until a few days after the second ALJ hearing. In a letter to the ALJ, Raven’s counsel stated, “Mr. Raven and I were both under the impression that the onset date was late 1996, as he had dismissed his prior request for hearing.” (R. 260)

functioning varied considerably during the period in question. For example, when he was hospitalized, he was markedly restricted. Averaging all eight years together, the doctor opined Raven was, on average, moderately restricted in his ability to perform the activities of daily living. (R. 548-49) The doctor offered the same opinion regarding Raven's ability to maintain social functioning. (R. 549)

Regarding Raven's ability to maintain concentration, persistence, and pace, Dr. Feinsilver stated as follows:

The big deterrent here will be whether he was sober or drinking. When people are actively drinking and problematically so, they're not going to concentrate on things other than procuring alcohol. And their reasoning ability . . . [a]nd their powers of attention and concentration would be markedly impaired. During periods of sobriety, and there were periods of sobriety during those eight years, even the incarceration was a period of sobriety, if you will, hopefully. He probably did fairly well. I would suggest that during periods of sobriety there was relatively little impairment in this regard. But there probably was some. My observations of him, in addition to what I read here, is that he's not quite as attuned to social give and take and interaction and concentrating in the normal ways, as many people might be. Again my overall rating is moderate. But acknowledging a fluctuation from what the rating would be at different times.

(R. 550) The doctor stated that any period of extended hospitalization could be considered an episode of decompensation, and he noted at least two such hospitalizations during the eight-year period. (R. 550-51)

Dr. Feinsilver did not find evidence that, due solely to depression, Raven had been impaired continuously for two or more years during the eight-year period, to an extent that would cause more than minimal limitations on his ability to perform any basic work activities. (R. 551) However, he opined that during the time Raven was living at Liberty

Square, “his functioning was quite marginal . . . [a]nd he was rather impaired.” (R. 552) He noted further, “And living at Liberty Square is symptomatic of having rather minimal functioning. Add a little stress to that, make things just a bit worse, and we’re probably below an acceptable threshold.” (*Id.*) If Raven had not been in the structured environment provided by Liberty Square, Dr. Feinsilver opined his stress levels likely would have increased, he probably would have been more socially isolated, and as a result, his depression could have been exacerbated or he might have started drinking again. (R. 552-53) Further, he opined there likely was not any continuous period of a year or more, from 1990 to 1998, when Raven could have functioned outside of a structured living arrangement. (R. 553) His opinion was based on the diagnoses of alcohol addiction, depression, and personality disorder, but he placed the greatest emphasis on Raven’s alcoholism. (R. 554)

Dr. Feinsilver found that except during periods when Raven was extremely intoxicated, he would have had only slight impairment during the eight-year period with regard to his ability to understand, carry out, and remember simple instructions, and to use judgment in making decisions. (R. 554-55) He found Raven would have been moderately impaired in his ability to tolerate stress, respond to supervision, get along with coworkers, and deal with usual work situations, and he would have been only slightly impaired in his ability to cope with changes in the work setting. (R. 555-56)

Dr. Feinsilver found that except for consuming alcohol, Raven had followed his prescribed treatment over the years fairly well. He noted that if Raven had remained abstinent from alcohol, “[h]e would have been a whole lot better off. And all of his rating would have been much higher. That’s really – it’s a very significant change.” (R. 556)

Looking specifically at July of 1998, Dr. Feinsilver opined Raven was “approximately moderately impaired” in terms of social functioning. (R. 559) He stated he “would suggest that there has always been some impairment in his social functioning. I have the general impression this is an impaired individual.” (*Id.*) He opined Raven was “doing somewhat better” as regards the activities of daily living, rating his level of impairment as “only mildly impaired.” (*Id.*) Regarding his ability to maintain concentration, persistence, and pace, the doctor found Raven would “do rather well,” as long as he was sober. (R. 60) However, he noted Raven would “not do perfectly with attending and concentrating even presuming sobriety. Because of the impact of social limitations and the impact of some inefficiency due to depression.” (*Id.*) The doctor rated Raven as “slight, mild impairment” in those areas. (*Id.*)

Looking at the period from October 1996 to June 1998, Dr. Feinsilver found Raven was “somewhat more than mildly impaired” in terms of “not living fully independently” at Liberty Square. (R. 561-62) He rated Raven as “between moderate and marked,” apparently in the areas of activities of daily living and maintaining social functioning. (R. 562) As far as Raven’s ability to complete a normal workday or work week without interruption from psychologically based symptoms, the doctor rated Raven’s ability as “approximately a good minus,” except for the periods when he was hospitalized and immediately before and after his hospitalizations. (R. 563) However, he noted Raven “was always somewhat vulnerable to stress,” and could not have tolerated stressful work at any time. (*Id.*)

The doctor recognized a particular area of concern surrounding Raven’s ability to interact well with others in the workplace. (*Id.*) Regarding his ability to maintain an adequate pace, the doctor noted, “It depends on the job.” (R. 564) For example, if the work were low in stress, Raven might perform adequately, but “[i]f the nature of the pace

was you have to relate to so many different people in this period of time, customer service of some sort, then he just wouldn't make it." (*Id.*) On the other hand, he might not need a slow-paced job if there was low stress and "no unusual demand on him." (*Id.*)

The doctor offered a rating of "good minus" regarding Raven's ability to respond reliably and refrain from outbursts or walking off the job if something was not going well. He offered a rating of slightly fair to good with regard to Raven's ability to maintain a schedule and regular attendance. (R. 565) Dr. Feinsilver noted all of these ratings were based on a presumption that Raven was remaining sober, noting, "All is lost if he's not sober." (*Id.*)

4. *Vocational expert's testimony*

The ALJ asked VE George Paprocki the following hypothetical question:

My first assumption is that we have an individual who during the period of time in question was between 42 and 50 years old. He was a male. He had a high school general equivalency diploma, plus additional training I believe in office machinery repair. Electronic office machine repair. And as a result – and he had past relevant work, as you've indicated in Exhibit B-30E. He had the following impairments. He had a recurrent depression, chronic substance abuse, personality trait disorder, and prostatitis. As a result of a combination of those impairments, he had the residual functional capacity as follows. He was not able to – or was able to do only simple routine repetitive work, which did not involve the use of independent judgement for decision making. And did not require very close attention to detail. He did require occasional supervision. He should not have worked at more than a regular pace and that's usually in three speeds of pace being fast, regular, and slow. And he should not have worked at more than a mild to moderate level of stress. Would this individual have been able to perform any job he previously

worked at either as he performed it or as it is generally performed within the national economy?

(R. 569-70)

The VE responded that the individual would have been able to handle “probably all of the work he did in the past, with the exception of the office machine repair. All of that activity was unskilled in nature. And I believe it otherwise fit within the boundaries of the hypothetical.” (R. 570)

The ALJ then asked the VE a second hypothetical question, as follows:

My next hypothetical would be an individual of the same age, sex, education, past relevant work, and impairments as previously specified, and this would be an individual who would have the residual functional capacity as follows. This individual was able to do only simple, routine, repetitive work, which did not require close attention to detail or use of independent judgement for decision making. He should have no more than occasional contact with the public, co-workers, and/or supervisors. He needed close to occasional supervisor [sic]. And by close, I mean that there should be a supervisor on site, but should not be – did not necessarily have to be looking over his shoulder. Regular to slow pace and no more than a mild level of stress. Would this individual have been able to perform any job he previously worked at either as he performed it or as it is generally performed within the national economy?

(*Id.*) The VE again responded that the individual would be able to perform all of the past jobs except the office machine repair. (R. 571)

The VE noted Dr. Feinsilver had testified there could be a problem with the individual’s ability to maintain a schedule and regular attendance. The VE stated, “Regular attendance would be necessary at any job regardless of what the physical or skill

requirements would be. . . . That's an essential part of work behavior in competitive employment. Again, irrespective of what the job may entail." (*Id.*)

Raven's attorney then posed the following hypothetical question to the VE:

Mr. Paprocki, if we look at a Claimant the same age, education, past work experience and impairments as the Claimant, and particularly we're focusing on impairments related to depression. And assume for the purposes of my hypothetical questions that any substance addiction is in remission and is not a factor. If the Claimant's concentration and attention is limited to the point where he'd be unable to maintain attention and concentration for extended periods of time, say an hour or more, would not be able to maintain consistency in thinking or in pacing. And would be off of task for a preponderance of time. And in addition would have to have minimal contact with others or the general public, would the Claimant be capable of performing his past work?

(R. 572) At the VE's request, counsel clarified that the phrase "he would be unable to work for a preponderance of time" meant the individual would be off of task up to one-third of the time. (R. 572-73)

The VE responded that an individual who would be off task for that period of time "would certainly not be able to meet the minimum requirements of employment. There are definite expectations regardless of what the job involves. Whether it's something to meet a quot[a] or not. If for a third of the period of time you're talking about at least a couple of hours a day, per day, that a person would not be able to most likely meet the requirements of a job." (R. 573)

5. *The ALJ's decision*

The ALJ found Raven had not engaged in substantial gainful activity since October 1, 1996, his amended alleged disability onset date. (R. 16, 25 ¶ 1) He found

Raven has impairments that include recurrent depression, personality disorder, chronic substance abuse, and prostatitis. (R. 21, 25 ¶ 2) If all of these impairments were considered, then the ALJ found they would be severe enough to meet the requirements of the Listings. (R. 21, 25-26 ¶ 4, 26 ¶ 6) However, disregarding the impact of Raven's substance abuse, the ALJ found his impairments to be severe, but not at a level that meets or equals the requirements of the Listings. (R. 21, 26 ¶ 7) Thus, he found Raven's substance abuse to be a contributing material factor to a finding of disability. (R. 21, 26 ¶ 12)

The ALJ discounted the opinions of Drs. Larsen and Gordon -- both State agency consultants -- and Raven's treating psychiatrist Dr. Lassise, because they did not articulate any distinction between Raven's functional limitations while he is abusing alcohol versus while he is sober. (R. 24, 26 ¶ 8) With regard to the opinion letter from Dr. Lassise, which described significant limitations in Raven's functional abilities, the ALJ found the letter "was dictated by a social worker, and only cosigned by Dr. Lassise." (R. 24) The ALJ chose to rely on the opinion of Dr. Feinsilver, who testified "regarding the claimant's capabilities, both while sober and while intoxicated," and whose "assessment is supported by the claimant's own satisfactory work record at Kraft when not intoxicated." (*Id.*) The ALJ further relied on the opinion given by Dr. Wright, another State agency consultant. (R. 23-24; *see* R. 304)

The ALJ determined Raven "is capable of simple, routine, repetitive work only. He is not capable of work requiring the use of independent judgment or very close attention to detail. He requires occasional supervision, can work at a regular pace and can tolerate mild to moderate stress." (R. 25, 26 ¶ 9) He found Raven's impairments do not

prevent him from performing his past relevant work. Therefore, the ALJ concluded Raven was not disabled “at any time through the date of [the] decision.” (R. 26 ¶ 13)⁶

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

A. Disability Determinations and the Burden of Proof

Section 423(d) of the Social Security Act defines a disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is “not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists . . . in significant numbers either in the region where such individual lives or in several regions of the country.” 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *Dixon v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003); *Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner will consider a claimant’s work activity. If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(i).

⁶This conclusion is obviously in error, as Raven was found to be disabled as of June 2, 1998, and the ALJ’s decision is dated August 29, 2001.

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see “whether the claimant has a severe impairment that significantly limits the claimant’s physical or mental ability to perform basic work activities.” *Dixon*, 353 F.3d at 605; *accord Lewis v. Barnhart*, 353 F.3d 642, 645 (8th Cir. 2003). The United States Supreme Court has explained:

The ability to do basic work activities is defined as “the abilities and aptitudes necessary to do most jobs.” . . . Such abilities and aptitudes include “[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling”; “[c]apacities for seeing, hearing, and speaking”; “[u]nderstanding, carrying out and remembering simple instructions”; “[u]se of judgment”; “[r]esponding appropriately to supervision, co-workers, and usual work situations”; and “[d]ealing with changes in a routine work setting.”

Bowen v. Yuckert, 482 U.S. 137, 140-42, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119 (1987) (citing 20 C.F.R. §§ 404.1521(b), 416.921(b)).

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. If the impairment meets or equals one of the presumptively disabling impairments listed in the regulations, then the claimant is considered disabled, regardless of age, education, or work experience. 20 C.F.R. § 404.1520; *Kelley*, 133 F.3d at 588.

Fourth, if the claimant’s impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant’s residual functional capacity (“RFC”) to determine the claimant’s “ability to meet the physical, mental, sensory, and other requirements” of the claimant’s past relevant work. 20 C.F.R. §§ 404.1520(4)(iv); 404.1545(4); *see Lewis*, 353 F.3d at 645-46 (“RFC is a medical question defined wholly in terms of the claimant’s physical ability to perform

exertional tasks or, in other words, ‘what the claimant can still do’ despite his or her physical or mental limitations.”) (citing *Bradshaw v. Heckler*, 810 F.2d 786, 790 (8th Cir. 1987); 20 C.F.R. § 404.1520(e) (1986)); *Dixon, supra*. The claimant is responsible for providing evidence the Commissioner will use to make a finding as to the claimant’s RFC, but the Commissioner is responsible for developing the claimant’s “complete medical history, including arranging for a consultative examination(s) if necessary, and making every reasonable effort to help [the claimant] get medical reports from [the claimant’s] own medical sources.” 20 C.F.R. § 404.1545(3). The Commissioner also will consider certain non-medical evidence and other evidence listed in the regulations. *See id.* If a claimant retains the RFC to perform past relevant work, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(iv).

Fifth, if the claimant’s RFC as determined in step four will not allow the claimant to perform past relevant work, then the burden shifts to the Commissioner “to prove that there is other work that [the claimant] can do, given [the claimant’s] RFC [as determined at step four], age, education, and work experience.” Clarification of Rules Involving Residual Functional Capacity Assessments, etc., 68 Fed. Reg. 51,153, 51,155 (Aug. 26, 2003). The Commissioner must prove not only that the claimant’s RFC will allow the claimant to make an adjustment to other work, but also that the other work exists in significant numbers in the national economy. *Id.*; 20 C.F.R. § 404.1520(4)(v); *Dixon, supra*; *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) (“[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.”) (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)); *Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000). If the claimant can make an adjustment to other work that exists in significant numbers in the national economy, then the Commissioner will find the claimant is not

disabled. If the claimant cannot make an adjustment to other work, then the Commissioner will find the claimant is disabled. 20 C.F.R. § 404.1520(r)(v).

B. The Substantial Evidence Standard

The court reviews an ALJ's decision to determine whether the ALJ applied the correct legal standards, and whether the factual findings are supported by substantial evidence on the record as a whole. *Hensley v. Barnhart*, 352 F.3d 353, 355 (8th Cir. 2003); *Banks v. Massanari*, 258 F.3d 820, 823 (8th Cir. 2001) (citing *Lowe v. Apfel*, 226 F.3d 969, 971 (8th Cir. 2000)); *Berger v. Apfel*, 200 F.3d 1157, 1161 (8th Cir. 2000) (citing 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971)). This review is deferential; the court must affirm the ALJ's factual findings if they are supported by substantial evidence on the record as a whole. *Id.* (citing *Estes v. Barnhart*, 275 F.3d 722, 724 (8th Cir. 2002); *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, "[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." *Krogmeier, id.*; *Weiler, id.*; accord *Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the

Commissioner's decision as well as evidence that supports it." *Krogmeier*, 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell*, 242 F.3d at 796; *Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)). The court must "search the record for evidence contradicting the [Commissioner's] decision and give that evidence appropriate weight when determining whether the overall evidence in support is substantial." *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (also citing *Cline*, *supra*).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does not "reweigh the evidence presented to the ALJ," *Baldwin*, 349 F.3d at 555 (citing *Bates v. Chater*, 54 F.3d 529, 532 (8th Cir. 1995)), or "review the factual record *de novo*." *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (citing *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); accord *Baldwin*, 349 F.3d at 555; *Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000). This is true even in cases where the court "might have weighed the evidence differently." *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); accord *Krogmeier*, 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse

the Commissioner's decision "merely because substantial evidence would have supported an opposite decision." *Baldwin*, 349 F.3d at 555 (citing *Grebenick v. Chater*, 121 F.3d 1193, 1198 (8th Cir. 1997)); *Young*, 221 F.3d at 1068; see *Pearsall*, 274 F.3d at 1217; *Gowell*, 242 F.3d at 796; *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. See, e.g., *Young v. Secretary of H.H.S.*, 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.*, 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. See *Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994); see also *Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler*:

The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

- 1) the claimant's daily activities;
- 2) the duration, frequency and intensity of the pain;
- 3) precipitating and aggravating factors;
- 4) dosage, effectiveness and side effects of medication;
- 5) functional restrictions.

Polaski, 739 F.2d 1320, 1322 (8th Cir. 1984). *Accord Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS

Raven argues the ALJ erred in finding his alcoholism was a material factor contributing to his disability. He claims, “This is absurd as there is nothing in the record affirmatively evidencing Mr. Raven’s alcoholism has been a factor since he spent several months at Liberty Square, a residential care facility, in October 1996.” (Doc. No. 8, p. 1) The Commissioner argues the ALJ’s determination was supported by substantial evidence in the record, and the ALJ correctly discounted the opinions of Drs. Gordon, Larson, and Lassise. (Doc. No. 11.

The court will examine the ALJ’s failure to give controlling weight to the opinion of Drs. Larsen, Gordon, and Lassise, which the ALJ justified by noting these doctors did not distinguish between Raven’s functional limitations while he is intoxicated versus when he is sober.

Dr. Gordon, a State agency consultant, administered several tests to Raven. Although he found one of the tests, the MMPI-2, likely was not accurate, he also noted Raven’s “responses on the Rey’s Test do not suggest malingering.” (R. 430) Dr. Gordon concluded that although Raven has the ability to perform many work-related functions, he “may have” problems getting along with coworkers and supervisors, interacting appropriately with the general public, and responding appropriately to changes in the work setting. The doctor indicated Raven’s pace “will be slow,” and he has poor judgment. (R. 431) These were conclusions based on present testing, not based on historical medical history. Dr. Gordon noted Raven may suffer from mild organic impairment that could be “related

to” his historical alcohol abuse, but nevertheless, the conclusions were current as of the time of the doctor’s evaluation on November 3, 1997.

Similarly, Dr. Larsen examined Raven on October 30, 1997, for purposes of a psychiatric evaluation. Again, this evaluation was conducted in a clinical setting, and was not merely the result of a records review. Like Dr. Gordon, Dr. Larsen found Raven is capable of performing many job-related functions. However, he concluded Raven “is unable to maintain adequate attention and concentration,” “he is unable to maintain adequate persistence and pace,” “[h]e would respond poorly to work pressures and changes in the work environment, and would tend to blame others[,]” and “[h]e would not respond appropriately to supervisors and has a history of not getting along well with coworkers.” (R. 436)

Although it is true, as the Commissioner indicates, that Dr. Larsen found Raven is able to cook, clean, do his own laundry, take care of his home, and attend to his personal needs, these daily activities are not indicative of his mental ability to function in the workplace. Furthermore, “an SSI claimant need not prove that [h]e is bedridden or completely helpless to be found disabled and the fact that claimant cooks and cleans for [him]self, shops for groceries, does laundry, visits friends, attends church, and goes fishing does not in and of itself constitute substantial evidence that a claimant possesses the residual functional capacity to engage in substantial gainful activity.” *Cline v. Sullivan*, 939 F.2d 560, 566 (8th Cir. 1991) (citing *Thomas v. Sullivan*, 876 F.2d 666, 669 (8th Cir. 1989)).

Both Dr. Gordon and Dr. Larsen examined Raven at a time when, by Raven’s uncontradicted testimony,⁷ he had been sober for approximately one year, with the

⁷The Commissioner claims Raven “testified that his driver’s license suspension was extended ‘this (continued...)”

possible exception of one or two occasions⁸ when he relapsed for two days. Both doctors were independent consultants who examined Raven at the request of Disability Determination Services, and both reached conclusions about Raven's mental functional abilities that would preclude Raven from competitive employment. The court finds it irrelevant that these doctors failed to distinguish between Raven's abilities while intoxicated and sober, because he was sober at the time of their examinations and their conclusions were not based on historical evidence.

Even more significant is the evaluation by Dr. Lassise, who has treated Raven since at least 1992. Dr. Lassise and social worker Ken Zimmerman conducted a clinical assessment of Raven to update their findings and recommendations as of November 1997. They found Raven could concentrate for no more than ten minutes at a time, and he could not "be relied upon to maintain consistency in thinking or in pacing himself behaviorally in a work setting without being off task for a preponderance of time." (R. 443) He has impaired judgment, does not handle frustration or stress well, and "demonstrates an inability to coordinate his work, his behaviors, or to adjust those in light of rapidly changing environmental conditions or in human relationships." (*Id.*)

⁷(...continued)

year' due to another OWI." (Doc. No. 11, p. 17, citing R. 485-86) The court disagrees with the Commissioner's characterization of Raven's testimony. Raven testified he lost his driver's license in 1990, due to an OWI. In response to his attorney's question, "How long was it suspended for at that time?" Raven replied, "I'm not sure. I think it was sometime this year." (*Id.*) His response could indicate his license suspension was supposed to be lifted "sometime this year," rather than being extended "sometime this year." Further colloquy between Raven and his attorney indicates the original license suspension that occurred in 1990 was extended on two occasions, but the record does not provide evidence of when those extensions occurred.

⁸It is not clear from Raven's testimony exactly when his relapses occurred, whether they were before or after his examinations by Drs. Gordon and Larsen.

The ALJ discounted these opinions because he found the opinion letter “was dictated by a social worker, and only cosigned by Dr. Lassise.” (R. 24) Regardless which of the practitioners “dictated” the letter, the opinion letter is signed equally by both the social worker and the physician, and the letter clearly indicates the conclusions it contains are those of both. (R. 443; “It is *our* opinion that [Raven] would be unable to carry out the functions of any employment over the next 12 to 24 months.” Emphasis added.)

The Commissioner argues Dr. Lassise’s conclusion that Raven would be unable to function in the workplace for twelve to twenty-four months “is a vocational assessment outside his area of expertise.” (R. 11, p. 15, citing *Clark v. Chater*, 82 F.3d 202, 204 (8th Cir. 1996)) The court finds *Clark* to be inapposite to the present case. In *Clark*, the ALJ rejected a doctor’s opinion “that Clark’s lack of education would prevent him from gainful employment” because the ALJ found the opinion was outside the doctor’s realm of expertise. *Clark*, 82 F.3d at 203. The Eighth Circuit affirmed the ALJ’s decision and found the ALJ “properly discounted the opinion of Clark’s treating physician,” but for a different reason; *i.e.*, “his opinion was not consistent with the objective evidence in the record[.]” *Clark*, 82 F.3d at 204. The court did not comment on the ALJ’s finding that the doctor’s opinion was outside his area of expertise.

Furthermore, in *Clark*, the doctor was the claimant’s treating orthopedist. Clearly, it *was* outside his area of expertise to opine that the claimant’s “lack of education would prevent him from gainful employment.” *Clark*, 82 F.3d at 203. The case at bar presents an entirely different picture. In this case, Dr. Lassise is Raven’s treating psychiatrist, and he offered an opinion specifically about Raven’s mental functional abilities to perform in the workplace. The court finds the doctor’s opinion fell well within his “area of expertise,” and was not limited to a purely “vocational assessment” falling outside that realm.

In *Prosch v. Apfel*, 201 F.3d 1010 (8th Cir. 2000), the Eighth Circuit Court of Appeals discussed the weight to be given to the opinions of treating physicians:

The opinion of a treating physician is accorded special deference under the social security regulations. The regulations provide that a treating physician's opinion regarding an applicant's impairment will be granted "controlling weight," provided the opinion is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] record." 20 C.F.R. § 404.1527(d)(2).

Prosch, 201 F.3d at 1012-13. Although a treating physician's opinion is not controlling when it conflicts with other substantial medical evidence, that is not the case here.

As Chief Judge Mark W. Bennett observed in *Wiekamp v. Apfel*, 116 F. Supp. 2d. 1056, 1063 (N.D. Iowa 2000), "The importance of the opinions of treating physicians in the determination of disability is well-settled[.]" *Id.* Judge Bennett quoted extensively from the Eighth Circuit's holding in *Singh v. Apfel*, 222 F.3d 448, 452 (8th Cir. 2000), noting, *inter alia*, the following:

In *Singh* . . . , where the court found that "[t]he record here is replete with evidence that substantiates the opinion of Singh's treating physician," the only contrary evidence was the opinions of non-treating physicians, and the treating physician was a specialist, the court held that the ALJ had improperly disregarded the conclusions of the claimant's treating physician. *Singh*, 222 F.3d at 452.

Wiekamp, 116 F. Supp. 2d at 1063. Similarly, in the present case, the ALJ chose to rely on an evaluation based on a records review by a non-examining psychologist, Dr. Wright, and a similar review by a non-examining, non-treating psychiatrist, Dr. Feinsilver, as

opposed to the opinions of three separate medical experts who actually examined Raven, and one of whom had treated him for five years at the time he rendered his opinion.⁹

The court finds the ALJ erred in discounting the opinions of Drs. Larsen and Gordon, and particularly Dr. Lassise, and in reaching a decision that Raven's alcoholism was a material factor contributing to his disability. The court finds the record contains substantial evidence to support the opposite conclusion – that Raven's disability from October 1996 to June 1998 was not due to alcoholism, and alcoholism was not a contributing factor to a finding of disability during that time period. Accordingly, the court finds the Commissioner's decision should be reversed, and this case should be remanded for payment of benefits.

V. CONCLUSION

The court may affirm, modify or reverse the Commissioner's decision with or without remand to the Commissioner for rehearing. 42 U.S.C. § 405(g). In this case, where the record itself "convincingly establishes disability and further hearings would merely delay receipt of benefits, an immediate order granting benefits without remand is appropriate." *Cline*, 939 F.2d at 569 (citing *Jefferey v. Secretary of H.H.S.*, 849 F.2d 1129, 1133 (8th Cir. 1988); *Beeler v. Bowen*, 833 F.2d 124, 127-28 (8th Cir. 1987)); accord *Thomas v. Apfel*, 22 F. Supp. 2d 996, 999 (S.D. Iowa 1998) (where claimant is unable to do any work in the national economy, remand to take additional evidence would

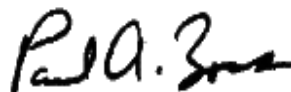
⁹In addition, the court finds Dr. Feinsilver's testimony to be contradictory and equivocal, at best. For example, he opined there likely was no continuous period of a year or more between 1990 and 1998 when Raven could have functioned outside of a structured living arrangement (R. 553), yet he opined that during the same time period, Raven was, on average, only moderately restricted in his ability to perform the activities of daily living. (R. 548-49) The court will not elaborate further for purposes of brevity, but refers the district court to Dr. Feinsilver's testimony at R. 547-69.

only delay receipt of benefits to which claimant is entitled, warranting reversal with award of benefits). In this case, the court finds the ALJ's decision should be reversed, and this case should be remanded for calculation and award of benefits.

Therefore, for the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections¹⁰ to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that the Commissioner's decision be reversed, and this case be remanded for calculation and award of benefits for the period beginning October 1, 1996, and ending June 1, 1998.¹¹

IT IS SO ORDERED.

DATED this 26th day of July, 2004.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

¹⁰Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

¹¹If the district court adopts this Report and Recommendation, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.